

MAIL ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

2001 APR 27 P 4: 35

In the Matter of

Implementation of the Non-Accounting
Safeguards of Section 271 and 272 of the
Communications Act of 1934, as amended.

CC Docket No. 96-149

ORDER ON REMAND

Adopted: April 23, 2001

Released: April 27, 2001

By the Commission:

I. INTRODUCTION

1. Section 271 of the Communications Act of 1934, as amended (Communications Act or Act), states that neither a Bell operating company (BOC) nor its affiliate may provide "interLATA services" except as set forth in that section.¹ In the *Non-Accounting Safeguards Order*, the Commission concluded that the term "interLATA services" as used in section 271 encompasses not only interLATA telecommunications services, but also interLATA information services.² Following the Commission's reconsideration of other aspects of the *Non-Accounting Safeguards Order*,³ the Bell Atlantic telephone companies (now known as the Verizon telephone companies) and U S WEST, Inc. (now known as Qwest Communications International Inc.) (collectively, Petitioners) petitioned for judicial review of the Commission's determination that interLATA information services fall within the scope of interLATA services. Because the

¹ 47 U.S.C. § 271(a). Local access and transport areas, or LATAs, are the local calling areas that were originally established by the Modification of Final Judgment (MFJ), the consent decree that divested the BOCs from AT&T. See *United States v. AT&T Corp.*, 552 F.Supp. 131 (D.D.C. 1982); *United States v. Western Elec. Co.*, 569 F.Supp. 990, 993 n.9 (D.D.C. 1983). The Communications Act defines a "local access and transport area" as a contiguous geographic area established by a BOC before the date of enactment of the Telecommunications Act of 1996 or thereafter modified with approval of this Commission. See 47 U.S.C. § 153(25).

² *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21932-33 at ¶¶ 55-57 (1996) (*Non-Accounting Safeguards Order*). See also 47 C.F.R. § 53.3.

³ No party asked the Commission to reconsider its ruling that the term "interLATA services" includes interLATA information services.

arguments advanced by the Petitioners in their appellate brief had not been raised in the administrative proceeding, the Commission moved for a voluntary remand to consider further the issues raised by the Petitioners. The D.C. Circuit granted the Commission's motion.⁴

2. In this Order on Remand, we examine the scope of the term "interLATA services" and reaffirm the Commission's conclusion in the *Non-Accounting Safeguards Order* that the term "interLATA services" as used in section 271 encompasses interLATA information services as well as interLATA telecommunications services. As explained below, we find this conclusion the most reasonable given the statutory language, structure, and history. We also find that the Commission's *Universal Service Report to Congress* is not inconsistent with this conclusion.⁵ A BOC therefore may provide interLATA information services only in accordance with the provisions of section 271.

II. PROCEDURAL HISTORY

3. Shortly after enactment of the Telecommunications Act of 1996 (1996 Act), the Commission issued a Notice of Proposed Rulemaking seeking to implement the non-accounting provisions of sections 271 and 272. Although this Notice did not specifically seek comment on the scope of the term "interLATA services," it noted, without explanation, that an "interLATA service" under the Act referred to a telecommunications service.⁶ In response, several parties, including some of the BOCs, disputed the Commission's characterization of "interLATA services" and specifically sought an interpretation of the term "interLATA services" that includes interLATA information services.⁷ BellSouth, for example, pointed out that the statutory definition of "interLATA service" refers not to "telecommunications services" but rather to the

⁴ *Bell Atlantic Tel. Companies v. Federal Communications Comm'n*, No. 99-1479 (D.C. Cir. Oct. 27, 2000) (order granting motion for remand).

⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Report to Congress*).

⁶ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308, at ¶ 41 n.80 (1996) (*Non-Accounting Safeguards NPRM*). In the context of examining the scope of section 272(a)(2)(C)'s reference to "interLATA information services," however, the Commission invited comment on how to distinguish an interLATA information service from an intraLATA information service. The Commission specifically observed that "BOC provision of information services involves both basic underlying transmission components, which transmit end-user information without change in the form or content of the information, and enhanced or information service functionality, which generates, acquires, stores, transforms, processes, retrieves, utilizes or makes available end-user information." *Id.* at ¶ 44. The Commission further inquired whether it should classify an information service as interLATA "only when the service actually involves an interLATA telecommunications transmission component," or, alternatively, whether the interLATA classification should apply to "any information service that potentially involves an interLATA telecommunications transmission component (e.g., the service can be accessed across LATA boundaries)." *Id.*

⁷ See *Non-Accounting Safeguards Order*, at ¶ 52 (citing comments and reply comments filed by Ameritech, BellSouth, ITAA, MCI, and MFS).

more general concept of “telecommunications” across LATA boundaries.⁸ Thus, according to BellSouth, interLATA information services were a subset of “interLATA services.”⁹

4. In the *Non-Accounting Safeguards Order*, the Commission broadened its initial interpretation consistent with the views of these commenters, concluding that “interLATA information services are provided via telecommunications transmissions and, accordingly, fall within the definition of interLATA service.”¹⁰ The Commission observed that an “interLATA service,” defined as a form of “telecommunications,” is not limited to telecommunications services because “information services are also provided *via telecommunications*.”¹¹ Moreover, the Commission concluded that, because an “interLATA information service” incorporates as a necessary, bundled element an interLATA telecommunications transmission component provided to the customer for a single charge, a BOC would be required to obtain section 271 authorization prior to providing, in-region, the interLATA telecommunications transmission component of an interLATA information service.¹² No party sought reconsideration of this aspect of the *Non-Accounting Safeguards Order*.

5. Following the Commission’s adoption of the *Third Reconsideration Order* in this docket,¹³ the Petitioners sought judicial review in the United States Court of Appeals for the District of Columbia Circuit, seeking reversal of the Commission’s holding that the term “interLATA services” includes interLATA information services. In their joint appellate brief, the Petitioners contend that the agency’s statutory interpretation conflicts with the statute’s plain meaning. In support of their argument, the Petitioners relied on a 1998 Commission *Universal Service Report to Congress* in which, they claim, the Commission had declared “that ‘telecommunications’ and ‘information services’ are mutually exclusive categories and that a provider of ‘information services’ does not *provide* ‘telecommunications’ but rather *uses* ‘telecommunications.’”¹⁴ Proceeding from that premise, the Petitioners argued that when a BOC or its affiliate provides an information service between LATAs via telecommunications, the BOC does not thereby “provide” an “interLATA service” under section 271(a).¹⁵ Thus, Petitioners

⁸ See, e.g., CC Docket No. 96-149, BellSouth Comments at 19, 22-23 (filed Aug. 15, 1996). See *infra* n. 38-44.

⁹ *Id.*

¹⁰ *Non-Accounting Safeguards Order*, at ¶ 56. See also *id.* at ¶ 122 (“Whenever interLATA transmission is a component of an information service, that service is an interLATA information service, unless the end-user obtains that interLATA transmission service separately, e.g., from its presubscribed interexchange provider.”).

¹¹ *Id.* at ¶ 56 (emphasis added).

¹² *Id.* at ¶ 57.

¹³ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) (*Third Reconsideration Order*). In the *Third Reconsideration Order*, the Commission, among other things, reaffirmed that the statute does not exclude out-of-region interLATA information services from the section 272(a)(2) separate affiliate requirement. *Id.* at ¶ 41.

¹⁴ Petitioners’ Brief at 4 (emphasis in original). See also Petitioners’ Brief at 12-13.

contended, the restrictions established by section 271 do not apply when a BOC or its affiliate provides an information service.

6. In response to the Petitioners' appellate brief, the Commission moved for a voluntary remand to consider further the issues raised by the Petitioners. The Commission explained that a remand was necessary because the principal arguments advanced by the Petitioners in their appellate brief had not been presented in the administrative proceeding. The Petitioners' appellate brief relied largely on a *Report to Congress* that the Commission issued more than a year after release of the *Non-Accounting Safeguards Order*. The Commission further noted that, in comments filed during reconsideration of other aspects of the *Non-Accounting Safeguards Order*, the Petitioners had appeared to advocate the very same statutory interpretation that they now challenged on appeal.¹⁶ In light of these factors, the Commission asked that the court grant it the opportunity to consider the proper scope of the term "interLATA services" based on a more complete administrative record. On October 27, 2000, the court granted the Commission's motion and remanded the matter to the Commission.¹⁷ The Commission subsequently sought further comment on the whether the term "interLATA service" encompasses interLATA information services.¹⁸

III. DISCUSSION

7. The question presented by the Petitioners is whether the term "interLATA services" in section 271 of the Act encompasses interLATA information services. As discussed below, we find that mere examination of the statutory language yields no conclusive answer. Rather, in considering, as we must, the statutory language and the structure, history, and purpose of the statute, we reaffirm that the most reasonable reading of the statute is that Congress intended that the term "interLATA service" in section 271 include interLATA information services as well as interLATA telecommunications services. Thus, the offering of an information service that involves telecommunications across a LATA boundary constitutes the provision of interLATA telecommunications in the unique context of section 271's interLATA services restriction.

8. As discussed below, our conclusion reaffirms the longstanding view of the federal courts and this Commission that limitations on BOC provision of interLATA services—under both the MFJ and the 1996 Act—extend to interLATA information services. The D.C. Circuit examined precisely this question within the contours of the MFJ and concluded that a BOC provides telecommunications across LATA boundaries when it offers a service that bundles the capability to store or manipulate information with interLATA transmission facilities that the

(Continued from previous page) _____

¹⁵ Petitioners' Brief at 2-3.

¹⁶ See, e.g., CC Docket No. 96-149, Bell Atlantic/NYNEX Joint Comments (filed April 2, 1997); U S WEST Reply Comments (filed April 16, 1997); U S WEST Petition for Reconsideration (filed Feb. 20, 1997).

¹⁷ See *Bell Atlantic Tel. Companies v. Federal Communications Comm'n*, No. 99-1479 (D.C. Cir. Oct. 27, 2000) (order granting motion for remand).

¹⁸ See *Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order*, CC Docket No. 96-149, Public Notice (rel. Nov. 8, 2000).

BOC either owns or leases.¹⁹ The D.C. Circuit explicitly rejected claims by some BOCs that an information service cannot also constitute the provision of interLATA telecommunications in the context of the MFJ's interLATA prohibition.²⁰ The Commission reached this same conclusion in the *Non-Accounting Safeguards Order*, finding that an information service that contains a bundled interLATA telecommunications component includes "telecommunications" between points located in different LATAs, and thereby satisfies the statutory definition of an "interLATA service."²¹ Even though the terms "information service" and "telecommunications service" are mutually exclusive, each is a subset of the broader term "interLATA services" insofar as each type of service involves telecommunications that cross LATA boundaries. Indeed, this matter apparently was so clear in 1996 that the BOCs themselves urged the same construction of the statutory language.²² In a reversal of their prior position, the Petitioners now claim that the statutory language "clearly" requires precisely the opposite of what they previously asserted was the "clear" meaning. As discussed below, we reject their latest position as contrary to the Act's text, structure, history, and purpose.

A. Statutory Language

9. In order to determine whether section 271's restriction on the BOCs' provision of interLATA services includes interLATA information services, we must first examine the relevant statutory language. Section 271(a) states that a BOC or its affiliate may not "provide interLATA services except as provided in [section 271]."²³ The Act defines "interLATA service" to mean "telecommunications between a point located in a local access and transport area and a point located outside such area."²⁴ "Telecommunications," in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."²⁵ "Telecommunications," however, is distinct from a "telecommunications service," which the Act separately defines as "the offering of telecommunications for a fee directly to the public, or to such classes of users as

¹⁹ See *United States v. Western Elec.*, 1989-1 Trade Cases at 68,400, 1989 WL 21992 (D.D.C. 1989), *aff'd* *United States v. Western Elec.*, 907 F.2d 160 (D.C. Cir. 1990) (*Gateway Services Appeal*). See *infra* Part III.C.1.

²⁰ See *United States v. Western Elec.*, 907 F.2d at 163.

²¹ See *Non-Accounting Safeguards Order*, at ¶ 55-57.

²² See *id.*, at ¶ 52 (citing comments and reply comments filed by Ameritech, BellSouth, ITAA, MCI and MFS); *infra* n. 38-44.

²³ 47 U.S.C. § 271(a).

²⁴ 47 U.S.C. § 153(21). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (b) established or modified by a [BOC] after such date of enactment and approved by the Commission." 47 U.S.C. § 153(25).

²⁵ 47 U.S.C. § 153(43).

to be effectively available directly to the public, regardless of the facilities used.”²⁶ The Act further provides that an “information service” means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”²⁷

10. In examining this statutory language, we are faced with a number of interrelated questions. First, is the interLATA restriction in section 271(a) governed by a plain meaning interpretation? Second, does the term interLATA services as used in section 271(a) encompass only separate offerings of telecommunications? Finally, what impact does the Commission’s previous interpretation of the term “provide,” as used in section 271, have on the scope of the term “interLATA services”?

1. Is the interLATA restriction in section 271(a) governed by a plain meaning interpretation?

11. The BOCs assert that the Commission violated the plain meaning of the Act by concluding that a BOC can be providing an interLATA service when it offers an information service that is transmitted across LATA boundaries.²⁸ The BOCs contend that a straightforward reading of the Act’s definitions shows that a BOC that provides an information service via telecommunications cannot also be deemed to be providing an “interLATA service,” which is defined as a form of telecommunications. The BOCs’ argument rests on the proposition that a BOC that provides an information service which bundles or “uses” interLATA telecommunications cannot also be deemed to be providing an interLATA service in the context of section 271.

12. In contrast to the BOCs, several commenters claim that information services plainly are covered by section 271(a)’s “interLATA services” restriction.²⁹ These commenters point out that the Act defines “interLATA services” broadly as telecommunications between points in

²⁶ 47 U.S.C. § 153(44).

²⁷ 47 U.S.C. § 153(20). Section 272 specifically refers to “interLATA information services,” but the Act does not separately define that term. *See* 47 U.S.C. § 272(a)(2)(C), (f)(2). The Commission’s rules for implementing sections 271 and 272 define “interLATA information service” as “an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component, provided to the customer for a single charge.” 47 C.F.R. § 53.3. Like section 271, section 272 applies only to the BOCs. It requires the BOCs to provide certain services through a separate affiliate.

²⁸ *See* BellSouth Comments at 5; Qwest Comments at 3-4; SBC Comments at 2-3; Verizon Comments at 1-2; BOC Reply Comments at 3-5. The BOCs—BellSouth, Qwest, SBC, and Verizon—each filed comments in support of the Petitioners’ arguments and jointly filed reply comments.

²⁹ *See, e.g.,* AT&T Comments at 1-5; Commercial Internet Exchange (CIX) Comments at 3-4; Competitive Telecommunications Assoc. (CompTel) Comments at 6-8; Focal Comments at 1-2; Illinois Commerce Comm’n Reply Comments at 3, 5-13; Information Technology Assoc. of America (ITAA) Comments at 2, 5-7; Level 3 Comments at 1-3; WorldCom Comments at 1-14.

different LATAs, and thus incorporates information services that are provided via interLATA telecommunications. According to these commenters, this is the only interpretation of the terms that is compatible with the overall language and structure of the Act, sections 271 and 272 in particular, and the historical genesis of the interLATA restriction in the MFJ. To find otherwise, these commenters claim, would run afoul of the purposes of the statute by permitting the BOCs to evade the restriction and thereby reduce the BOCs' incentives to open their local markets.

13. We conclude that the relevant statutory definitions, either separately or in combination, do not clearly indicate whether "interLATA services" in section 271 includes or excludes information services. Rather, we find that including interLATA information services within the scope of "interLATA services" in section 271 is the interpretation that most reasonably fits with the statutory language.

14. Our reading of the statute is consistent with the position espoused by many of the BOCs at an earlier stage of this proceeding.³⁰ In comments filed in response to the *Non-Accounting Safeguards NPRM*, for example, BellSouth endorsed the very statutory interpretation that the BOCs now challenge.³¹ Stating that an "interLATA information service is a subset of interLATA service," BellSouth emphasized that "the definition of 'interLATA service' does not encompass 'telecommunications service' but applies instead to 'telecommunications' across LATA boundaries."³² Accordingly, BellSouth explained, "an 'interLATA information service' is an 'information service' that also constitutes an 'interLATA service' because it is provided via interLATA 'telecommunications.'"³³ Other BOCs supported BellSouth's interpretation.³⁴ Bell Atlantic, for example, claimed in a 1997 reconsideration proceeding that "interLATA information services clearly fall within the Act's definition of 'interLATA services' because, by

³⁰ See *Non-Accounting Safeguards Order*, at ¶¶ 52-54. See also CC Docket No. 96-149, Comments of BellSouth Corporation (filed Aug. 15, 1996) (BellSouth 1996 Comments), at 19, 22-23; Reply Comments of Ameritech (filed Aug. 30, 1996) (Ameritech 1996 Reply Comments), at 32-34.

³¹ See *Non-Accounting Safeguards Order*, at ¶ 52. See also CC Docket No. 96-149, BellSouth 1996 Comments, at 19, 22-23.

³² BellSouth 1996 Comments at 19 n.45, 22-23. Specifically, BellSouth observed that the Commission premised its discussion of interLATA information services in the *Non-Accounting Safeguards NPRM* on "the belief that such services do not fall within the definition of 'interLATA services,'" yet, BellSouth claims, "[t]he contrary is true, however, because interLATA information services do indeed fall within the definition of 'interLATA service.'" *Id.* at 20. BellSouth made similar arguments in a petition for reconsideration concerning the section 272 separate affiliate requirements for out-of-region interLATA information services. See CC Docket No. 96-149, BellSouth Petition for Reconsideration (filed Feb. 20, 1997), at 10-13.

³³ *Id.*

³⁴ See, e.g., Ameritech 1996 Reply Comments, at 32-34 (explaining that "'interLATA information service' is a term of art [applying] to the situation where the BOC provides transport across LATA boundaries bundled with its information service" and citing the *Gateway Services Appeal*). See also CC Docket No. 96-149, Opposition of SBC Communications Inc. to Petitions for Reconsideration (filed April 2, 1997), at 12-13 (explaining that the transmission associated with a service determines whether the service is interLATA or intraLATA—if it is transmitted across LATA boundaries, it is interLATA and if the transmission is wholly within a LATA, it is intraLATA).

definition, interLATA information services must include telecommunications that cross LATA boundaries.”³⁵ U S WEST maintained that the term “interLATA services” could reasonably be read to include information services, arguing that certain incidental services identified in section 271(g)(1) and (2) plainly were information services.³⁶ Given their past positions on the subject of “interLATA information services,” the BOCs cannot plausibly claim that the statute plainly means what they now say it means.

2. Do interLATA services as used in section 271(a) encompass only separate offerings of telecommunications?

15. The BOCs attempt to equate an interLATA service with a separate offering of telecommunications to customers, whether on a public or private basis. In the BOCs’ view, the “telecommunications” referenced in the definition of “interLATA service” must comprise a separate offering to the customer and cannot be construed as an input in the offering of an information or other service.

16. The relevant statutory definitions, however, do not compel such an interpretation. Nowhere does the statutory definition of “interLATA service” require that the telecommunications aspect of such a service be provided directly to end-users rather than included as a component in a bundled offering.³⁷ We view these statutory definitions, when read within the specific context of sections 271 and 272, as part of a coherent overall framework. All information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulating information. The transmission of information to and from these computers constitutes “telecommunications,” for the transmission itself does not alter the form or content of the information.³⁸ Information services therefore are, as explicitly stated in the statutory definition, conveyed “via telecommunications,” whether or not the telecommunications component is separately supplied by either the provider or the customer. Some information services may be

³⁵ CC Docket No. 96-149, Joint Comments of Bell Atlantic and NYNEX on Petitions for Reconsideration (filed April 2, 1997), at 9.

³⁶ See CC Docket No. 96-149, Reply of U S WEST, Inc. to Oppositions to Petitions for Reconsideration (filed April 16, 1997), at 3 (supporting an interpretation that “interLATA services” as used in section 271(a) includes information services); *id.* at 4 (acknowledging that interLATA information services contain an interLATA component). See also CC Docket No. 96-149, U S WEST Petition for Reconsideration (filed Feb. 20, 1997), at 2-5 (contending that the BOCs could provide out-of-region interLATA information services without using a separate affiliate); *Request for Extension of the Sunset Date of the Structural, Non-Discrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, Inter-LATA Information Services*, CC Docket No. 96-149, Opposition of U S WEST Communications, Inc. (filed Dec. 17, 1999), at 7 (claiming that the BOCs would not act anticompetitively in the interLATA information services market upon sunset of the separate affiliate requirement because the BOCs cannot even provide those services).

³⁷ Telecommunications is the underlying medium, or the transmission path, by which information services are accessed by end users or made accessible by information service providers.

³⁸ See 47 U.S.C. § 153(43). See AT&T Comments at 7-8.

conveyed via telecommunications that cross LATA boundaries, while others may be conveyed via transmissions that stay within the same LATA. Thus, we conclude the terms “interLATA service” and “information service” are not mutually exclusive. An information service—like a telecommunications service—may be either intraLATA or interLATA. An “information service” is an “interLATA service” when the telecommunications component of the information service offering crosses a LATA boundary. In other words, an “information service” is also an “interLATA service” if the associated telecommunications transmission is interLATA in nature.

17. Unlike the terms “telecommunications service” and “information service,” both of which are defined by reference to the act of “offering,” the Act defines the term “interLATA service” more broadly, without reference to its availability as a separate offering. InterLATA service means, quite simply, “telecommunications” between LATAs, without regard to whether the telecommunications is separately being “offered,” or, if so, to whom. Juxtaposed against the definitions of “telecommunications service” and “information service,” it is reasonable to infer that Congress intended that the “telecommunications” involved in an interLATA service could be a component in a broader service “offering.” Read in conjunction with the term “provide,” which precedes “interLATA services” in section 271(a), the focus is not, as the BOCs suggest, on whether a BOC is separately “providing” “telecommunications” to subscribers when it provides an information service.³⁹ Presumably, if Congress had intended to focus on the BOCs’ provision of telecommunications to subscribers, it would have defined “interLATA service” as a “telecommunications service.” But that is not what the statute says. Rather, the Act defines “interLATA service” in terms of “telecommunications.” Consequently, the language of section 271(a) is most reasonably read to prohibit a BOC from providing any telecommunications transmission that crosses LATA boundaries. This interpretation also is most consistent with Congress’s use of the term “interLATA information service” elsewhere in the Act. The “information service” itself need not, as the BOCs suggest, “qualify as” or “be” “telecommunications” (for, in fact, an information service is by definition more than the pure transmission of information).⁴⁰ It suffices under the broad “interLATA services” definition that the information service is conveyed via telecommunications that is interLATA in nature. A BOC can therefore “provide interLATA services” under the Act, even when it is not separately providing telecommunications to its subscribers.⁴¹

³⁹ See Petitioners’ Brief at 11 (“a BOC or its affiliate must ‘provide’ ‘telecommunications’”).

⁴⁰ See Petitioners’ Brief at 7, 9, 17.

⁴¹ This conclusion is consistent with the D.C. Circuit’s rejection of a similar argument in the *Gateway Services Appeal*. See *infra* Part III.C.1. In that case, some of the BOCs contended that the interLATA portion of the gateway service was not offered for hire (*i.e.*, “not separately identified to the customers and not separately charged to the customer”) even though it was bundled with the overall gateway service that clearly was offered for hire. The D.C. Circuit rejected this “rather strained interpretation,” holding that such a view would create an enormous loophole in the decree’s core interLATA prohibition. *United States v. Western Elec.*, 907 F.2d at 163. The district court similarly had rejected the notion that the telecommunications component must be offered separately, finding more generally that when “a call, transmission, or service” crosses LATA boundaries, it is interLATA in nature. *United States v. Western Elec.*, 1989 WL 21992 at *1.

3. What impact does the Commission's previous interpretation of the term "provide," as used in section 271(a), have on the scope of the term "interLATA services?"

18. To the extent that the BOCs' argument that an information service provider can never be deemed to be providing interLATA telecommunications turns on the meaning of "provide" in section 271,⁴² we note that both the Commission and the D.C. Circuit have confirmed that the term "provide" has a unique and broad meaning in the context of section 271. Irrespective of the meanings given the term "provide" in other sections of the Act,⁴³ the term "provide" in section 271 must be construed in the context of the unique terms, structure, history, and purposes of that section.⁴⁴ Use of the term "provide" in section 271(a) therefore must be construed in light of that section's dual purposes of preventing the BOCs from using bottleneck local facilities to discriminate in favor of their owned or leased interLATA facilities and giving the BOCs maximum incentive to open their local markets to competition.⁴⁵ As the D.C. Circuit recognized, a narrow reading of the term "provide" in section 271 would tempt the BOCs to defer conduct that Congress hoped to accelerate; acts facilitating the development of competition in the intraLATA market.⁴⁶ In this context, we believe that "provide" should be read so that section 271 applies to information services that include interLATA transmission components.

B. Statutory Structure

19. Our conclusion that interLATA services encompass information services not only makes sense under a natural reading of the statutory definitions, but also permits a uniform application of the terms and structure of sections 271 and 272.⁴⁷ Section 271 explicitly exempts some information services from the interLATA services restriction. Specifically, section 271(b)(3) permits the BOCs to provide certain "incidental interLATA services" enumerated in section 271(g) without first satisfying section 271's market-opening criteria.⁴⁸ By exempting

⁴² See, e.g., BellSouth Comments at 6-7; BOC Reply Comments at 2, 4-5.

⁴³ See, e.g., 47 U.S.C. § 153(44) (defining "telecommunications carrier" as a provider of telecommunications services).

⁴⁴ *U S WEST v. Federal Communications Comm'n*, 177 F.3d at 1059-61. The D.C. Circuit reasoned that "the differences in the statutory contexts justifies different outcomes." *Id.* at 1061.

⁴⁵ See *id.* at 1060.

⁴⁶ *Id.* See also AT&T Comments at 18-20; CIX Reply Comments at 14-17; WorldCom Comments at 6-7. The D.C. Circuit in *U S West* also found that it does not matter whether the facilities used to provide the interLATA service are owned or leased by the BOC.

⁴⁷ See *Gade v. National Solid Waste Management Ass'n*, 112 S.Ct. 2374, 2384 (1992) (individual statutory provisions should be interpreted in a manner consistent with the structure and necessary assumptions of the other provisions).

⁴⁸ 47 U.S.C. § 271(b). See *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Order on Reconsideration, 12 FCC Rcd 2297 at (continued....)

these services, the statute presupposes that “incidental interLATA services” are a subset of the broader category of interLATA services to which the restrictions apply. Section 271(g), in turn, defines “incidental interLATA services” as the interLATA provision by a BOC or its affiliate of certain specified services, some of which are information services. Section 271(g)(4), for example, refers to information storage and retrieval services that permit a customer located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities located in another LATA.⁴⁹ As another example, section 271(g)(1)(D) identifies alarm-monitoring services.⁵⁰ If these and other information services identified in section 271(g), when conveyed via interLATA telecommunications, were not “interLATA services,” it would have been unnecessary for Congress to exempt them from section 271(a)’s restriction.⁵¹ By exempting certain information services as incidental interLATA services, Congress signaled that it viewed interLATA information services as a subset of the broader category of “interLATA services.” Congress must have intended that section 271(a) would restrict the BOCs from providing interLATA information services that were not specifically exempted.

20. The BOCs’ sole rebuttal to the above statutory analysis is that Congress enacted certain provisions of section 271(g) as mere “extra, unnecessary assurance” that certain specified information services were not intended to be included within section 271(a)’s interLATA service restriction even though, under the BOCs’ rationale, such services should already be excluded in a more comprehensive manner, under the plain meaning of section 271(a).⁵² This internal inconsistency in the BOCs’ argument demonstrates its fundamental flaw. First, as a matter of statutory interpretation, we are obligated to interpret statutory language in a manner that gives meaning to each word—if at all possible—over an interpretation that renders certain words superfluous.⁵³ The interpretation we adopt does this. By contrast, the BOCs concede that their

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¶ 3 (1997). Section 271(b) specifies how section 271 applies to certain classes of “interLATA services,” including in-region services, out-of-region services, and incidental interLATA services.

⁴⁹ See 47 U.S.C. § 271(g)(4).

⁵⁰ 47 U.S.C. § 271(g)(1)(D). See also 47 U.S.C. § 271(g)(2) (Internet services provided over dedicated facilities to schools).

⁵¹ See AT&T Comments at 11-12; Assoc. of Communications Enterprises (ASCENT) Reply Comments at 4-5; CIX Comments at 6; CompTel Comments at 5-6; WorldCom Comments at 7-8. To the extent that the BOCs attempt to derive an inconsistency with section 272(a)(2)(B)’s enumeration of certain incidental interLATA services under the heading of “interLATA telecommunications services,” we note that the storage and retrieval services identified in section 271(g)(4) are not listed among those enumerated services. See BOC Reply Comments at 17, 20. Moreover, alarm monitoring services, identified as incidental in section 271(g)(1)(D), are specifically excluded from section 272(a)(2)(C)’s interLATA information services separate affiliate requirement rather than section 272(a)(2)(B)’s interLATA telecommunications services requirement.

⁵² SBC Comments at 4-5; BOC Reply Comments at 22-24.

⁵³ See, e.g., *Hoffman v. Connecticut Dept. of Income Maintenance*, 429 U.S. 96, 103 (1989) (statute should be construed to “give effect, if possible, to every clause and word”); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 833-34 (9th Cir. 1996) (“statute must be interpreted to give significance to all of its parts . . . statutes should not be construed to make surplusage of any provision.”). See also *Office of Consumer’s Counsel v. FERC*, 783 F.2d 206, 220 (D.C. Cir. 1986) (same).

interpretation construes parts of section 271 as “extra, *unnecessary* assurance.” (emphasis added). Indeed, if section 271(a), on its face, so clearly excludes interLATA information services, Congress would not have found it necessary to reinforce this point by making an additional, redundant requirement that a certain subset of interLATA information services are excluded from the section 271(a) restriction on the grounds that they are “incidental.” Surely, if Congress had intended to exclude all information services from the restrictions of section 271, it would have been more apt to ensure that the “core”—as opposed to the “incidental”—information services were expressly excluded.⁵⁴ Alternatively, Congress could have made explicit that *any* interLATA information service is an incidental interLATA service exempt from the restrictions of section 271(a). Congress chose neither path. We find that the BOCs’ interpretation of section 271(g) violates basic canons of statutory construction by giving no independent meaning to the provisions of section 271(g) that address information services.

21. Moreover, the BOCs’ argument conflicts with section 271(h), which states that the exceptions in section 271(g) are to be narrowly construed.⁵⁵ In addition, section 271(h) directs that certain of the incidental interLATA services identified in section 271(g)(1) “are limited to those interLATA transmissions incidental to the provision by a [BOC] of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public.”⁵⁶ Section 271(h), therefore, supports the view that section 271(a)’s restriction can reach services such as information services that a BOC provides to customers via interLATA transmissions, without requiring a finding that the BOC separately offered the transmission component to its subscribers.

22. Our conclusion that “interLATA services” in section 271 includes interLATA information services also harmonizes section 271 with the text and structure of section 272 of the Act. The BOCs’ position, in contrast, would cause section 271 to be in tension with certain provisions of section 272. As an initial matter, we agree with several commenters who contend that section 272’s explicit reference to both “interLATA telecommunications services” and “interLATA information services” is strong evidence that Congress viewed these two types of services as subsets of the broader category of “interLATA services.”⁵⁷

23. We find little significance in the BOCs’ observation that section 272(a)(2)(B) refers specifically to section 271 and its attendant concepts (such as “origination”) whereas section 272(a)(2)(C) does not.⁵⁸ The BOCs attempt to justify their reliance on section 272(a)(2)(B) by

⁵⁴ See AT&T Reply Comments at 5-6 (claiming that, under SBC’s view, Congress “obviously would have made its ‘clarification’ by exempting all interLATA information services, rather than just the few specific such services that are listed in Section 271(g).”).

⁵⁵ See WorldCom Comments at 8.

⁵⁶ 47 U.S.C. § 271(h) (emphasis added).

⁵⁷ See, e.g., AT&T Comments at 12-13; CIX Comments at 4; CompTel Comments at 5; Illinois Commerce Comm’n Reply Comments at 9-12; Level 3 Comments at 2; WorldCom Comments at 9-11.

⁵⁸ See Petitioners’ Brief at 15; SBC Comments at 6; BOC Reply Comments at 15-16.

suggesting that Congress intended to distinguish between interLATA telecommunications provided on a common carrier basis (*i.e.*, telecommunications services) and interLATA telecommunications offered on a non-common carrier basis (*e.g.*, private services).⁵⁹ We are unpersuaded by this argument. Even if there were some support for this unlikely assertion, which we do not find, the BOCs fail to offer any rational explanation for section 272(a)(2)(C)'s explicit reference to "interLATA information services."⁶⁰ We find that Congress's use of this term offers strong support for concluding that information services can be interLATA services. The BOCs offer no reasoned explanation why, under their interpretation, Congress would have used the term "interLATA information services" in the first place. If, as the BOCs contend, a carrier providing an information service can never be deemed to be providing an interLATA service, then Congress would have had no need to distinguish between interLATA and intraLATA information services. If the term "interLATA information service" is to have any meaning, then "interLATA services" in section 271 must be read to include information services.

24. The Petitioners also make much of the fact that section 272(f) establishes a sunset date for the "interLATA information services" separate affiliate requirement that is different from the sunset date for the "interLATA telecommunications services" separate affiliate requirement.⁶¹ The latter date is tied to a BOC's section 271 authorization, whereas the sunset date for the "interLATA information services" requirement is a date certain that is unrelated to the section 271 process.⁶² But there may be a simple explanation for the different sunset dates: unlike the separate affiliate requirement for interLATA telecommunications services, the requirement for interLATA information services applies to both in-region and out-of-region services, and the section 271 authorization process does not apply to out-of-region services.⁶³ In any event, we accord little significance to Congress's unexplained decision to treat the service offerings differently for sunset purposes in light of the other statutory evidence previously discussed. The sunset dates established by section 272(f) appear to have no bearing on the scope of the term "interLATA service" in section 271.⁶⁴ Even assuming that the existence of differing

⁵⁹ Petitioners' Brief at 10, 19-20; Qwest Comments at 5-8; SBC Comments at 5; BOC Reply Comments at 16-17. To the extent that the Petitioners claim that Congress intended to distinguish private line services, we note that certain private line services are expressly subject to section 271's in-region, interLATA restriction. *See* 47 U.S.C. § 271(j).

⁶⁰ *See also* 47 U.S.C. § 272(f)(2) (establishing a sunset date for applicability of section 272's provisions to interLATA information services).

⁶¹ Petitioners' Brief at 15; Qwest Comments at 6; SBC Comments at 6; BOC Reply Comments at 18-19.

⁶² *See* 47 U.S.C. § 272(f)(1), (2).

⁶³ *See* ASCENT Reply Comments at 9; ITAA Comments at 10-11; WorldCom Comments at 13.

⁶⁴ We note that the legislative history offers no support for the BOCs' explanation of the varying sunset dates. The 1996 Act grew out of a House bill that provided a single sunset date for the separate affiliate required to provide all interLATA services and a Senate bill that did not provide a sunset date for any services. *See* H.R. 1555, 104th Cong., 1st Sess., 246(k) (1995); S. 652, 104th Cong., 1st Sess., 102 (1995). Thus, both the House and the Senate initially treated the services uniformly. The Conference Committee offers no explanation for the subsequent decision to establish different sunset dates for the different services. *See* WorldCom Comments at 12-14.

sunset dates is consistent with the BOCs' reading of the statute, consistency is not enough to prove their point. This single factor arguably supporting the BOCs' position is outweighed by the extensive indications elsewhere that Congress intended to include information services within the scope of section 271's interLATA services. Moreover, the fact that Congress required a separate affiliate for interLATA information services in the first place demonstrates, as discussed below, that Congress understood that the BOCs retain significant market power that could potentially be leveraged into other adjacent markets.

C. Statutory Purpose and History

25. As confirmed by the D.C. Circuit, the purpose and history of section 271 are relevant to its meaning.⁶⁵ As stated above, section 271 creates a regulatory scheme that seeks to encourage the BOCs to open their local markets to competition by requiring them to do so before they may enter in-region, interLATA services market. The D.C. Circuit has recognized that the scheme established by section 271 creates "a powerful incentive" for the BOCs to open their local markets, in addition to protecting against discrimination in the interLATA market.⁶⁶ Allowing the BOCs immediately to provide information services across LATA boundaries would reduce the BOCs' incentive to comply with the market-opening requirements.⁶⁷ We find no evidence that Congress intended to blunt the effectiveness of this incentive by excluding BOC provision of in-region, interLATA information services from the restrictions of section 271. Indeed, as discussed below, given the purpose and context of the 1996 Act, it is more logical to assume the contrary.

1. MFJ Precedent

26. Prior to the 1996 Act, the service offerings of the BOCs were governed by the consent decree, commonly known as the Modification of Final Judgment or MFJ, that settled the Department of Justice's antitrust suit against AT&T and required the divestiture of the BOCs.⁶⁸ The MFJ prohibited the BOCs from entering certain lines of business, including interexchange (*i.e.*, long distance) services and information services (provided on either an interLATA or intraLATA basis).⁶⁹ These line-of-business restrictions were premised upon the theory that, if the BOCs were allowed to enter these other markets, they could use their bottleneck control in the

⁶⁵ See *U S WEST Communications, Inc. v. FCC*, 177 F.3d at 1060.

⁶⁶ *Id.*

⁶⁷ See AT&T Comments at 4-5; Level 3 Comments at 5-7.

⁶⁸ See *United States v. American Tel. and Tel.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁶⁹ Although the AT&T consent decree referred to "exchange areas" and "interexchange services," shortly after approving the decree, the district court switched to the "LATA" and "interLATA services" terminology to avoid confusion with the traditional exchange areas defined by various local regulators. See *United States v. Western Elec.*, 569 F.Supp. 990, 993 n.9 (D.D.C. 1983). The court explained that it would use the term "LATA" when referring to the exchange area that was created through the antitrust decree. *Id.* For simplicity, we use the LATA terminology consistently herein, even when referring to the decree.

local and exchange access markets to obtain an unfair advantage in the interLATA and information services markets.⁷⁰ Although the district court overseeing the decree eventually lifted the restriction on providing information services within a LATA, the court left intact the MFJ's "core" interLATA restriction, which prevented the BOCs from providing information services on an interLATA basis.⁷¹ The court specifically emphasized that the newly established authority for the BOCs to provide information services did not modify in any way the still-extant interLATA prohibition.⁷²

27. The court later reaffirmed that the decree's interLATA prohibition precluded the BOCs from providing information services across LATA boundaries. In a case involving a BOC proposal to provide a gateway service to customers seeking connection to information service providers, the district court held that the transmission of information across LATA boundaries in the context of a gateway information service would constitute the provision of an interLATA service in violation of the decree.⁷³ The court reasoned that "when a call, transmission, or service crosses LATA boundaries, it is interexchange in character," and, as such, the BOCs are prohibited from providing it.⁷⁴ The D.C. Circuit affirmed this ruling in a case known as the *Gateway Services Appeal*. Specifically, the D.C. Circuit held that "when information services

⁷⁰ With respect to the interLATA services restriction, for example, the district court found that permitting the BOCs to compete in that market would "undermine the very purpose of the proposed decree—to create a truly competitive environment in the telecommunications industry." *United States v. American Tel. and Tel.*, 552 F.Supp. at 188. Were the BOCs allowed to provide interLATA services while they maintained bottleneck control of the local exchange facilities, the court found that they would have the incentive and ability to discriminate against competitors in the interLATA market and subsidize their interLATA prices with profits earned from their monopoly services. *Id.* Thus, the interLATA restriction on the BOCs represented "an integral and vital part of the prophylactic remedy represented by the decree." *United States v. Western Elec.*, 673 F.Supp. 525, 543 (D.D.C. 1987).

⁷¹ In 1987, the district court partially removed the information services restriction by permitting the BOCs to transmit information generated by others and to provide gateway services between customers and information service providers within a LATA. At that time, however, the district court continued the prohibition on BOC generation or manipulation of information. *See United States v. Western Elec.*, 673 F.Supp. 525 (D.D.C. 1987); *United States v. Western Elec.*, 714 F.Supp. 1 (D.D.C. 1988). In response to a remand from the D.C. Circuit, the district court fully removed the information services line-of-business restriction. *See United States v. Western Elec.*, 767 F.Supp. 308 (D.D.C. 1991). Although this ruling enabled the BOCs to generate information, it did not permit the BOCs to provide information services on an interLATA basis. Specifically, the removal of the information services restriction did not affect the district court's prior ruling, affirmed on appeal, that the decree's interLATA prohibition precluded the BOCs from providing information services across LATA boundaries. *See supra* n. 17, 31.

⁷² *See United States v. Western Elec.*, 690 F.Supp. 22, 28 (D.D.C. 1988) ("Clearly, the Court did not modify the interexchange prohibition of the decree when it allowed [BOC] participation in the transmission of information services."). *See also United States v. Western Elec.*, 714 F.Supp. at 21 (emphasizing the continuation of the core long distance restriction).

⁷³ *See United States v. Western Elec.*, 1989 WL 21992.

⁷⁴ *Id.* at *1. The court found it "immaterial" whether the BOC provided the services directly or through the use of facilities leased from long distance carriers, and rejected the notion that the interLATA portion of the offering was merely incidental to or an auxiliary part of the whole. *See id.* at n.12, n.14.

are, as here, bundled with leased interexchange lines, the activity is covered by the decree.”⁷⁵ To conclude otherwise, the D.C. Circuit explained, would “create an enormous loophole in the core restriction of the decree” by permitting a BOC simply to package interLATA service, no matter how extensive, with some other nontelecommunications service.⁷⁶ Although the BOCs subsequently sought a waiver of the interLATA prohibition to permit gateway information services across LATA boundaries, the court had not acted on the waiver petition when Congress enacted the 1996 Act.

2. Legislative History and Purpose

28. With the passage of the 1996 Act, Congress overhauled telecommunications regulation and supplanted the MFJ with a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”⁷⁷ Congress sought to promote telecommunications competition by creating a carefully balanced regime that fundamentally changed the conditions and incentives for market entry. With respect to the local telephone market, Congress enacted market-opening mechanisms to remove impediments to competition and give all carriers an opportunity to provide local services.⁷⁸ By adding section 271, Congress also established a process for the BOCs to gain entry into the long distance market.⁷⁹ Recognizing the continued and extensive market dominance of the BOCs in their regions, however, Congress chose to maintain the MFJ’s restriction on BOC provision of in-region, interLATA services until such time as the BOCs demonstrated that their local markets are open to competition. Section 271 therefore prohibits a BOC or its affiliate from entering the in-region, interLATA market until the BOC complies with certain market-opening criteria. In this manner, Congress struck a careful balance that sought to cultivate a competitive environment by giving the BOCs a powerful incentive to open up their local markets.⁸⁰

29. The 1996 Act defined the term “interLATA service” to mean “telecommunications

⁷⁵ *United States v. Western Elec.*, 907 F.2d at 163.

⁷⁶ *Id.* Like the district court, the D.C. Circuit declined to draw a distinction between whether the BOC leased or owned the underlying interLATA transmission facilities. *Id.*

⁷⁷ *Non-Accounting Safeguards Order*, at ¶ 1 (quoting Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 1 (1996)). Section 601 of the 1996 Act states that “[a]ny conduct or activity that was . . . subject to any restriction or obligation imposed by the AT&T Consent Decree” shall, as of February 8, 1996, give way to the “restrictions and obligations imposed by [the 1996 Act].” Pub. L. 104-104, Title VI, § 601(a)(1), Feb. 8, 1996, 110 Stat. 143 (codified at 47 U.S.C. § 152 note).

⁷⁸ *See, e.g.*, 47 U.S.C. §§ 251, 253.

⁷⁹ *See* 47 U.S.C. § 271.

⁸⁰ *See AT&T Corp. v. Ameritech Corp.*, File No. E-98-41 *et al.*, Memorandum Opinion and Order, 13 FCC Rcd 21438, 21441-47, ¶¶ 4-7 (1998); *aff’d U S WEST Communications Inc. v. Federal Communications Comm’n*, 177 F.3d 1057 (D.C. Cir. 1999), *cert denied*, 528 U.S. 1188 (2000).

between a point located in a local access and transport area and a point located outside such area.”⁸¹ The 1996 Act also added or modified several other definitions found in the Communications Act, including those that apply to “telecommunications,” “telecommunications service,” and “information service.” The Commission previously has found that Congress intended the definitions of “telecommunications,” “telecommunications service” and “information service” to build upon the frameworks established prior to the passage of the 1996 Act, including the MFJ and Commission precedent.⁸² For our present purposes, there is no material difference between the scope of the terms “telecommunications” and “information services” under the MFJ and the Act. Both the MFJ and the Act define “telecommunications” as the transmission of information without change in its form or content, and both define information services as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, or making available information “via telecommunications.”⁸³ Similarly, the Act’s definition of “interLATA service” as telecommunications between a point located in a LATA and a point located outside such area is nearly identical to the MFJ’s definition of “interexchange telecommunications.”⁸⁴ The Act’s use of language substantially similar to that of the MFJ is strong evidence that Congress intended the operative terms to be construed as they had been under the MFJ, at least in the absence of evidence to the contrary.⁸⁵

30. In enacting the 1996 Act, Congress did not simply preserve the MFJ’s core restriction without modification. Congress indeed modified the interLATA restriction explicitly to allow the immediate provision of out-of-region interLATA services. The BOCs claim that this action somehow shows that Congress also intended to lift the MFJ’s restriction on interLATA transmission of information services. We disagree. The BOCs point to nothing in the 1996 Act or its legislative history to suggest that Congress intended to overrule the *Gateway Services Appeal*. Nor do we find anything to suggest that Congress intended in the 1996 Act to codify a BOC request that was pending before the MFJ court to waive the effect of the *Gateway Services*

⁸¹ 47 U.S.C. § 153(21).

⁸² See generally *Non-Accounting Safeguards Order* at ¶¶ 102-07; *Report to Congress* at ¶ 21.

⁸³ Compare 47 U.S.C. § 153(20), (43) with *United States v. American Tel. & Tel.*, 552 F.Supp. at 229 (MFJ at IV.J, IV.O). The MFJ defined information services as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *which may be conveyed* via telecommunications . . .” whereas the Act defines information services as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .” We find no substantive distinction in these definitions for our present purposes.

⁸⁴ Compare 47 U.S.C. § 153(21) with *United States v. American Tel. & Tel.*, 552 F.Supp. at 229 (MFJ at IV.K). The MFJ’s prohibition extended to BOC provision of “interexchange telecommunications services,” whereas the Act refers simply to “interLATA services.” Compare 47 U.S.C. § 271(a) with *United States v. American Tel. & Tel.*, 552 F.Supp. at 227 (MFJ at II.D.1). The Act contains no requirement that the offering of “interLATA service” necessarily entail the provision of a “telecommunications service.” See AT&T Comments at 11.

⁸⁵ See, e.g., *Johnson v. United States*, 529 U.S. 694, 710 (2000) (“[W]hen a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the pre-cursor in fathoming the new law.”).

Appeal.⁸⁶ We are not persuaded that Congress would preserve the in-region, interLATA restriction using language similar to that used in the decree yet intend a result sharply divergent from the D.C. Circuit's interpretation of that restriction.⁸⁷ To the contrary, when Congress intended to modify the MFJ's restrictions, as in the case of out-of-region interLATA services, it did so explicitly.

31. We disagree with the BOCs that our construction of section 271 undermines Congress's goal of promoting the deployment of information services by "opening all telecommunications markets to competition."⁸⁸ Although Congress intended the end product of the 1996 Act to be the creation of competition in all telecommunications markets and the removal of all historic monopolies, it did not seek to achieve this goal by permitting the BOCs to provide interLATA services—including interLATA information services—immediately. Instead, Congress appears to have codified the MFJ's interLATA restriction for services provided by the BOCs in their historic monopoly regions, and thereby preserved the consent decree's core prohibition until such time as the BOCs satisfied the market-opening criteria set forth by Congress in section 271.

32. We also reject the BOCs' argument that treating interLATA information services as interLATA services will somehow subject many, if not all, information service providers to regulation as common carriers, which would entail tariff filing requirements, interconnection obligations, and mandatory payments to the universal service fund.⁸⁹ The BOCs' argument ignores the Act's distinction between "telecommunications" and "telecommunications service." An entity may be subject to common carrier obligations if it provides "telecommunications services." As explained below, the Commission has distinguished between telecommunications services and information services. Our construction of "interLATA services" to include interLATA information services does not have the effect of imposing common carrier obligations on information service providers that are simply using telecommunications as a means of providing an information service to end users. Even though a BOC information service offering may also be deemed to be the provision of interLATA telecommunications under section 271, information service providers as such are not providing "telecommunications service" under the Act, and thus are not subject to common carrier regulation.

33. We also are not persuaded by the BOCs' argument that we should exclude interLATA information services from the category of interLATA services so as not to place BOC information service providers at a competitive disadvantage with respect to other information service providers.⁹⁰ Our inclusion of interLATA information services appropriately recognizes

⁸⁶ See BOC Reply Comments at 13-14.

⁸⁷ See CIX Reply Comments at 7 ("Congress was well aware of the *Gateway Services Appeal* when drafting the Act.").

⁸⁸ BOC Reply Comments at 14 (quoting Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 1 (1996)).

⁸⁹ See BOC Reply Comments at 2, 6-10.

⁹⁰ See BOC Reply Comments at 10-15.

that the statute imposes certain restrictions only on the BOCs. Among those restrictions, Congress clearly intended to preserve the “core” MFJ long distance restriction as an incentive for the BOCs to open their local markets. Our decision is consistent with that congressional determination.⁹¹

D. Universal Service Report to Congress

34. The BOCs contend that our conclusion that the term “interLATA services” in section 271 includes interLATA information services is inconsistent with statements the Commission made in a 1998 *Universal Service Report to Congress*. In that Report, the Commission concluded that an information service provider does not provide telecommunications service and generally does not provide telecommunications to its subscribers. According to the BOCs, these statements demonstrate that a BOC that provides an information service cannot also be deemed to be providing an “interLATA service” under section 271.⁹² The BOCs therefore treat the *Report to Congress* as establishing the proposition that if an entity provides an information service, the Act’s terms foreclose a finding that it can be deemed to be providing “telecommunications” for any purpose. We disagree, and find nothing in the *Report to Congress* that is inconsistent with our interpretation of interLATA service in section 271.

35. The Commission’s primary task in the *Report to Congress* was to examine the Commission’s implementation of the 1996 Act provisions regarding universal service.⁹³ Under the 1996 Act, telecommunications carriers that provide interstate telecommunications service must contribute to the mechanisms established by the Commission to preserve and advance universal service.⁹⁴ The *Report to Congress* examined whether the 1996 Act overruled prior Commission precedent by requiring the Commission to treat information service providers as “telecommunications carriers” that are subject to the contribution requirement. That determination turned on the Act’s definition of a “telecommunications carrier” as a provider of “telecommunications service.”⁹⁵ Upon examining the statutory language and context, the Commission concluded that the 1996 Act did not require it to treat information service providers as telecommunications carriers. Quite clearly then, the *Report to Congress* was not intended to, and did not, address the issue of whether an information service could be an “interLATA service” under section 271.⁹⁶

⁹¹ See, e.g., 47 U.S.C. § 160(d).

⁹² See, e.g., BellSouth Comments at 2-5; Qwest Comments at 3-4; SBC Comments at 2-4.

⁹³ See *Report to Congress*, at ¶¶ 1, 6, 13 (explaining that the Commission revisited its findings regarding the way it interpreted the terms “information service,” “local exchange carrier,” “telecommunications,” “telecommunications service,” “telecommunications carrier,” and “telephone exchange service” when it implemented the universal service provisions of the 1996 Act).

⁹⁴ See 47 U.S.C. § 254(d).

⁹⁵ See 47 U.S.C. § 153(44).

⁹⁶ See AT&T Comments at 16-17; Consumers Union Reply Comments at 2-3.

36. In making its determination that information service providers are not telecommunications carriers, the Commission examined whether under the Act information service providers also provide a “telecommunications service,” and concluded, as the Commission consistently has found in the past, that they do not. In examining the relationship between telecommunications services and information services, the Commission affirmed its prior findings that the categories of “telecommunications *service*” and “information service” are mutually exclusive.⁹⁷ In recognizing this distinction, however, the Commission could not deny that information services by definition are provided “via telecommunications” and that telecommunications could therefore be a component of an information service.

37. The BOCs rely heavily on the passage that follows the Commission’s recognition of the distinction between telecommunications services and information services:

*Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers “telecommunications.” By contrast, when an entity offers transmission incorporating the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” it does not offer telecommunications. Rather, it offers an “information service” even though it uses telecommunications to do so.*⁹⁸

This passage is properly interpreted as distinguishing between information services and telecommunications services, both of which include and use telecommunications. The passage discusses the act of offering telecommunications, which is incorporated into the definition of a telecommunications service.⁹⁹ Moreover, the introduction of the passage reinforces its intent to illustrate the mutual exclusivity between telecommunications services and information services offered to subscribers—not between information services and telecommunications.¹⁰⁰ The language makes the basic point that an information service essentially bundles with it a telecommunications component, making it impossible for an information service offered to a subscriber to qualify as a telecommunications service. Yet, the passage does not delink telecommunications from information services. The quoted language, therefore, does nothing to foreclose the possibility that a BOC that is using interLATA transmission capacity to provide an information service to its subscribers could also be deemed to be providing an “interLATA service” under section 271.

⁹⁷ *Report to Congress*, at ¶ 39 (emphasis added).

⁹⁸ *Id.* (emphasis added).

⁹⁹ See 47 U.S.C. § 153(46) (defining “telecommunications service” as “*the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.*”) (emphasis added).

¹⁰⁰ See, e.g., Illinois Commerce Comm’n Reply Comments at 4, 7 (maintaining that the Commission’s finding of mutual exclusivity between telecommunications and information services applies to those services from an end-user perspective).

38. In fact, the *Report to Congress* recognized that in cases in which an information service provider owns the underlying transmission facilities, and engages in data transport over those facilities in order to provide an information service, one could argue that the information service provider is “providing” telecommunications to itself by furnishing raw transmission capacity for its own use.¹⁰¹ Although the Commission acknowledged that it does not currently require such information service providers to contribute to universal service mechanisms, the Commission also indicated that it may be appropriate to reexamine that result.¹⁰² Moreover, as the BOCs point out, the Commission stated that information service providers “generally do not provide telecommunications.”¹⁰³ This reflects the Commission’s finding that at that time most information service providers were not also telecommunications service providers (*i.e.*, network providers). The Commission therefore examined the services provided by information service providers in general, leaving room for a different conclusion in specific situations. Notably, the Commission did not specifically examine BOC provision of information services in the *Report to Congress*, nor was it intending in any way to interpret the term “interLATA service” in the context of section 271. Yet, the very fact that the Commission recognized that a situation in which an information service provider owns the underlying transmission facilities might be cause for different treatment undercuts the BOCs’ reliance on the language of the *Report to Congress* to demonstrate that BOCs could never be deemed to be providing interLATA telecommunications when they provide an information service.

39. In any event, to the extent that certain statements read in isolation and taken out of context could be construed to suggest that the terms “information services” and “telecommunications” are mutually exclusive, such an interpretation was not intended and, more importantly, we believe such an interpretation would be incorrect, for reasons outlined in this Order. As explained above, an information service cannot possibly be mutually exclusive of “telecommunications” because the Act defines “information service” as a service that is provided “via telecommunications.”¹⁰⁴ We reject any such interpretation.

IV. CONCLUSION

40. Although the Act is not a model of clarity in many respects, our examination of the statutory terms, structure, history, and purposes all lead to the conclusion that a BOC’s bundling of interLATA transmission with an information service offering constitutes the provision of an “interLATA service” in the context of section 271. We therefore reaffirm the Commission’s conclusion in the *Non-Accounting Safeguards Order* that the term “interLATA service” used in section 271 encompasses interLATA information services as well as interLATA

¹⁰¹ *Report to Congress*, at ¶¶ 15, 69.

¹⁰² Under section 254(d), all telecommunications service providers are required to contribute to universal service mechanisms, whereas the Commission has discretion to require providers of interstate telecommunications to contribute if the public interest so requires. *See* 47 U.S.C. § 254(d).

¹⁰³ *Report to Congress*, at ¶¶ 15, 55 (emphasis added).

¹⁰⁴ *See* 47 U.S.C. § 153(20).

telecommunications services. Accordingly, the BOCs must comply with the requirements of section 271 before providing in-region, interLATA information services.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED that the ORDER ON REMAND IS ADOPTED.

42. IT IS FURTHER ORDERED that the Motion for Extension of Time to File Reply Comments of the Illinois Commerce Commission IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Magalie Roman Salas". The signature is written in a cursive, flowing style.

Magalie Roman Salas
Secretary